No. 12,571

IN THE

United States Court of Appeals

For the Ninth Circuit

DUANE MOSS, ET AL., *Appellants,*

vs.

HAWAIIAN DREDGING CO., ET AL., *Appellees.*

MARTIN H. LARSEN, ET AL., *Appellants,*

vs.

FLOOD BROS. (a corporation), et al., *Appellees.*

Motion of Pacific Maritime Association for Leave to File a Brief as Amicus Curiae.
and
Brief of Pacific Maritime Association as Amicus Curiae With Appendices

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To the Honorable, the Judges of the United States Court Of Appeals for the Ninth Circuit:

Now comes Pacific Maritime Association and respectfully moves that the Court grant leave to file the annexed brief *amicus curiae,* and that the Court consider it in support of the constitutionality of Section 16(e) of the Fair Labor Standards Amendments of 1949 (29 U.S.C., 216b).

The decision of this constitutional issue is of major significance. A large number of overtime-on-overtime suits are pending in various courts in the continental United States and in the Territory of Hawaii. Many of these in-

volve the longshore and stevedoring industry and seek recovery against members of this Association, whose membership includes virtually all Pacific Coast employers of longshore and stevedoring labor.

Pending in this court is *Duane Moss, et al. v. Hawaiian Dredging Co., et al.,* and consolidated cases, No. 12,571. Other cases, including many being defended by private employers as well as those defended by the United States, are pending in the District Courts in California, Washington and Hawaii. In at least one of these, counsel for the plaintiffs have specifically agreed with counsel undersigned that the complaints may be dismissed if the Overtime-on-Overtime Act is held constitutional.

Respectfully submitted,

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Attorneys for Pacific Maritime Association.

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PRELIMINARY STATEMENT

The cases in this appeal involve overtime-on-overtime claims for periods between December, 1942, and August, 1946. Appellants are some 1200 walking bosses and warehousemen employed in the longshore and stevedoring industry in the San Francisco Bay area. Their claims are based on Section 16 of the Fair Labor Standards Act, 29 U.S.C. § 216.

Appellants were all paid in full under their contracts with their employers. This included time and a half overtime pay for all work outside of their basic, normal or regular 30-hour workweek, consisting of the first 6 hours of work between 8:00 A.M. and 5:00 P.M., Mondays through

Fridays. This contract overtime pay (sometimes called "clock overtime" because applicable to certain hours during the day and week) gave these workers the most advantageous overtime conditions held by any group of workers in the country. These are far better than the statutory minimum, which permits 40 hours to be paid for at the straight time rate before overtime premium need be paid. In fact, it has been found that longshoremen's contracts give them 8½ times as much overtime as they would have under the statutory 40-hour rule (Appendix, p. 16).

When the work involved in this appeal was done, the employers believed that payment of overtime in accordance with the high standard of these contracts *ipso facto* fully satisfied the lesser minimum standard of the law. This belief was in good faith and in reliance on rulings of the Administrator of the Wage and Hour Law and other government agencies. (Tr. 53, 54.) This was also accepted by the appellants and the thousands of longshoremen for years (Appendix, pp. 12, 15). Appellants' present claims, which ask additional overtime on top of that so paid, were found by the trial court to be a "species of synthetic afterthough" (Appendix p. 27).

In keeping with the original understanding of the Act, it was amended in 1949 to provide specifically that payment of contract overtime, such as received by appellants, fully satisfies the minimum requirements of the law.

Congressional action became necessary after ideas of pyramiding statutory overtime on top of contractual overtime were conceived and developed. These use the contractual overtime pay as an inflated base for a second level of overtime penalties. Thus has developed the descriptive phrase "overtime-on-overtime." In 1948, long after the work here involved was done, the Supreme Court adopted

its own version of pyramiding.* Appellants claim this entitles them to ripen their windfall claims into judgments although the pyramiding device on which they rely has now been thoroughly discredited and carefully excluded from the law by the 1949 retroactive amendment. The constitutionality of this legislation is the issue now before this Court.

The District Court judgment denying these claims is based on two independent grounds. The first is the good faith defense under the Portal-to-Portal Act of 1947 (Public Law 49, 80th Congress, C. 52; 61 Stat. 84; 29 U.S.C., §§ 251-262); the trial court held that the defendants had relied in good faith upon administrative rulings of the Administrator of the Fair Labor Standards Act and of other government agencies and in good faith followed the pay practices approved by such rulings in paying appellants contractual overtime without overtime-on-overtime (Tr. 53). The second ground relied on by the trial court is the Overtime-on-Overtime Act; the trial court held this statute to be a bar to the claims (Tr. 54). Appellants attack the latter ground simply on their claim that this statute is unconstitutional.

The statute attacked is now Section 16(c) of Public Law 393, 81st Congress; 29 U.S.C. § 216b. This reads:

> "No employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended (in any action or proceeding commenced prior to or on or after the effective date of this Act), on account of the failure of said employer to pay an employee compensation for any period of overtime work performed prior to July 20, 1949, if the compensation paid prior to July 20, 1949 for such work was at least equal to the compensation which

Bay Ridge Co. v. Aaron, 334 U.S. 446.

would have been payable for such work had section 7 (d) (6) and (7) and section 7 (g) of the Fair Labor Standards Act of 1938, as amended, been in effect at the time of such payment."

This is a reenactment of the provision of Section 2 of Public Law 177, 81st Congress. This provision, plus the substantive changes of Section 7 of the Fair Labor Standards Act of 1938 referred to therein, constitute what has become popularly known as the "Overtime-on-Overtime Act."

THE PROCEDURE

The procedure for handling this appeal was determined after preliminary hearing before this court on June 19, 1950. The parties then agreed that a decision sustaining the constitutionality of the Overtime-on-Overtime Act would dispose of this appeal and that thereupon a final judgment could be entered for the appellees. It was also agreed *in distinction to the above* that a decision holding this act unconstitutional would not justify a reversal of the trial court decision, for it could dispose of only one of the separate and complete grounds for the judgment in favor of appellees (Tr. 74, 75). Giving consideration to this agreement, this court ruled that the issue of the constitutionality of the Overtime-on-Overtime Act would first be considered (Tr. 70).

SUMMARY OF ARGUMENT

Unanimity of decision sustains the retroactive modifications of the Fair Labor Standards Act incorporated in the Portal-to-Portal Act. Appellants here ask this court to overrule these decisions and hold a like retroactive modi-

fication of the Fair Labor Standards Act unconstitutional. The cases, however, fully sustain the constitutionality of such legislation as a valid exercise of the power of Congress to regulate commerce. This power authorizes Congress to alter or abolish claims based on the Fair Labor Standards Act at any time before they have ripened into a final judgment.

ARGUMENT

The Legislation and Its History.

The Overtime-on-Overtime Act was intended by Congress to provide a workable assimilation of contractual and statutory provisions for the payment of overtime compensation.

To do this, Congress has provided that there shall be no pyramiding of statutory overtime on top of contractual overtime. Overtime premium payable under a labor contract may be excluded from the computation of the regular rate of pay under the Fair Labor Standards Act and may be credited against any overtime premium due under that Act. With this being assured, employers and labor organizations are free to enter into collective bargaining arrangements to give overtime conditions better than the minimum established by law. This is why organized labor, employers, and the government joined in unanimously expressing the need for this legislation. All agreed that the Supreme Court rule, which deviated from the generally accepted opinion that all "clock overtime" time and a half premium could be credited against statutory overtime and also from the Administrator's opinion that most of this could be credited, was thoroughly unsuited to the needs of commerce. All insisted that the rule should provide that

clock overtime premium required by contract is creditable against statutory overtime premium.[1]

The retroactive provision was added in the Senate after exhaustive hearings on the subject. On the basis of these hearings, the Congress concluded that the overtime-on-overtime claims were of the same nature as, and indistinguishable from, the Portal-to-Portal claims and that the flood of overtime-on-overtime claims was a burden on interstate commerce that, like the earlier flood of Portal-to-Portal claims, threatened the free flow of commerce. Following the example of portal-to-portal, another retroactive modification of the Fair Labor Standards Act was enacted to protect commerce. This, the Overtime-on-Overtime retroactive provision, is accordingly in the mold of retroactive modification of the Fair Labor Standards Act used in Section 2(a) and Section 9 of the Portal-to-Portal Act.[2]

When Congress was considering the retroactive provision, appropriate consideration was given to the claims of appellants. Among the many witnesses appearing before the committee composed of Senators Hill, Withers and

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1. The bill passed the House by vote of 230 to 7 (95 Cong. Rec. 1472-1479, February 21, 1949). The findings of the House Committee, that this legislation was necessary because the then existing overtime-on-overtime requirement seriously burdened and obstructed commerce, are set forth in *House Report No. 121, 81st Congress, 1st Session* (accompanying H. R. 858). See particularly that portion printed at p. 3 of the Appendix. Also see *Senate Report No. 402, 81st Congress, 1st Session* (accompanying H. R. 858), particularly paragraphs printed at pp. 14 and 18 of the Appendix.

2. *Senate Report No. 402* adopted the findings of the Portal-to-Portal Act. It further found, "The overtime-on-overtime claims cannot be distinguished from the claims covered by the Portal-to-Portal Act." and, "The situation requires the same expeditious and equitable treatment by Congress." See portions of the *Report* printed at pp. 19 and 20 of the Appendix. The several retroactive modifications of the Fair Labor Standards Act referred to are printed in the Appendix at pp. 21-22.

Morse, was counsel for appellants. Counsel's claim of inequity was presented along with all the other evidence. While it appears that the committee was not impressed with the merits of the argument made by appellants' counsel, in any event the committee's decision as to the overall issue before it was clear. Its report on retroactive relief recognized the "traditional policy against the granting of such relief except in special circumstances," but spelled out its findings as to the need for relief from overtime-on-overtime as a general rule covering all industry and all cases. Acting on the committee's recommendations, *the Senate adopted retroactivity without any dissent.*[3]

The Commerce Power and Portal-to-Portal.

The Overtime-on-Overtime retroactive provision is constitutional for the same reasons that sustain these other retroactive modifications of the Fair Labor Standards Act. *It is a proper exercise of the Congressional power to regulate interstate commerce.* This power "is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution. . . . The sovereignty of congress, though limited to specified objects, is plenary as to those objects. . . . The wisdom and the discretion of congress, their identity with the people, and the influence

3. 95 Cong. Rec. 6746, 6747 (May 23, 1949). The relevant portions of *Senate Report No. 402* are printed at pp. 15 to 20 of the Appendix. The House and Senate Reports are printed in full in the appendix to appellees' brief. The testimony and written material submitted by Mr. Resner, counsel for appellants, is reported in *Hearings before a Sub-committee of the Committee on Labor and Public Welfare of the United States Senate Eighty-first Congress First Session on S. 336 and H. R. 858* at 493-540, 595-598.

which their constituents possess at elections, are . . . the sole restraints on which they have relied, to secure them from its abuse."[4] In the exercise of this power, Congress may use an unreviewable judgment in fashioning remedies to foster and promote commerce by removing burdens and obstructions to its free and uninterrupted flow, and even to prevent commerce from promoting physical, moral or economic evil. *"This broad commerce clause* does not operate so as to render the nation powerless to defend itself against economic forces that Congress decrees inimical or destructive of the national economy. Rather it *is an affirmative power commensurate with the national needs. It is unrestricted by contrary state laws or private contracts."*[5]

The constitutionality of retroactive modifications of the Fair Labor Standards Act is fully established. All the constitutional arguments attacking them have been fully disposed of in several opinions.[6] So clear is the case, that the later opinions of the Courts of Appeal, including three opinions of this Court, have upheld that the constitutionality of the retroactive modifications without any extended discussion of the arguments.[7]

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4. *Gibbons v. Ogden,* 9 Wheat 1, 196, 197.

5. (Italics added) *North American Co. v. Securities & Exchange Commission,* 327 U.S. 686, 705, and cases cited at 705 and 706. See also *Norman v. Baltimore & Ohio R. Co.,* 294 U.S. 240, cases cited at pp. 307-311; *National Carloading Corp. v. Phoenix-El Paso Express, Inc.,* 142 Tex. 141, 176 S.W.2d 564, cert. den. 322 U.S. 747.

6. *Rogers Cartage Co. v. Reynolds,* 166 F.2d 317 (6th Circ.); *Seese v. Bethlehem Steel Co.,* 168 F.2d 58 (4th Circ.); *Battaglia v. General Motors Corp.,* 169 F.2d 254 (2d Circ.) cert. den. 335 U.S. 887; *Darr v. Mutual Life Ins. Co.,* 169 F.2d 262 (2nd Circ.) cert. den. 335 U.S. 871; *Fisch v. General Motors Corp.,* 169 F.2d 266 (6th Circ.) cert. den. 335 U.S. 902.

7. *Potter v. Kaiser Co.,* 171 F.2d 705 (9th Circ.); *Role v. J. Neils Lumber Co.,* 171 F.2d 706; *Lassiter v. Guy F. Atkinson Co.,* 176 F.2d 984 (9th Circ.); *Atallah v. Hubbert & Co.,* 168 F.2d 993 (4th Circ.), cert. den. 335 U.S. 868 *sub nom Cingrigrani v. Hubbert;*

"Up to now every decision has upheld the constitutionality of the [Portal-to-Portal retroactive] statute. The unanimity of result represents as accurate an expression of the views of the federal judiciary as it is possible to obtain. In adition to this unanimity among District Courts and Courts of Appeals there is the uniform refusal of certiorari by the Supreme Court. We have been taught that a denial of certiorari does not mean Supreme Court approval of a Court of Appeals position. But in this particular situation where there have been eight denials involving the same constitutional question, we think that the series of denials is not without an implicit significance with regard to the Supreme Court's attitude upon the question involved."[8]

Despite this unanimity of decision, appellants ask that these cases be *overruled.* Their argument is not that this Court should distinguish the overtime-on-overtime retroactive clause, or its effect, from the several portal-to-portal retroactive modifications of the Fair Labor Standards Act. Their argument, if meritorious, would apply equally to all these retroactive modifications of that Act. In this situation, the trial court concluded, "The issue of constitutionality as raised is not substantial."[9]

Lasater v. Hercules Powder Co., 171 F.2d 263 (6th Circ.); *Lee v. Hercules Powder Co.,* 171 F.2d 950 (7th Circ.); *McDaniel v. Brown & Root, Inc.,* 172 F.2d 466 (10 Circ.); *Newsom v. E. I. duPont de Nemours & Co.,* 173 F.2d 856 (6th Circ.), cert. den. 338 U.S. 824; *Busch v. Wright Aeronautical Corp.,* 174 F.2d 322 (6th Circ.); *Adkins v. E. I. duPont de Nemours & Co.,* 176 F.2d 661 (10th Circ.); *Manosky v. Bethlehem-Hingham Shipyard,* 177 F.2d 529 (1st Circ.); *Bumpus v. Remington Arms Co.,* 183 F.2d 507 (8th Circ.).

8. *Thomas v. Carnegie-Illinois Steel Corp.,* 174 F.2d 711, 713 (3rd Circ.).

9. Tr. 54, 55.

The Counter-Arguments.

These provisions are retroactive, but it is well established that *retroactive laws are not prohibited by the Constitution in civil cases.* The courts have no power to declare an Act of Congress void upon that ground alone.[10]

The retroactive provisions admittedly have affected statutory rights. "What was taken away was the right to recover on claims of purely statutory origin, claims given by statute not as compensation for labor performed but as a means of regulating wages and hours of work in interstate commerce."[11] These rights are purely statutory. They are but the incidental product of a regulation of commerce. They are rights of a "private-public character"[12] and so peculiarly subject to modification, control or abolition in the public interest. *Being "purely the creature of statute, they may be altered or abolished by the Congress which established them at any time before they have ripened into final judgment."*[13]

A contention has been made that some statutory overtime pay rights are of a contractual nature. This contention, self-contradictory on its face, is of no consequence

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10. *Fisch v. General Motors Corp.,* 169 F.2d 266, 271, 272, **upholding Portal-to-Portal,** citing *Blount v. Windley,* 95 U.S. 173, 180; *Watson v. Mercer,* 8 Pet. 88, 110. See also *Calder v. Bull,* 3 Dall. 386, 390; *Stephens v. Cherokee Nation,* 174 U.S. 445, 477, 478; *Johannessen v. United States,* 225 U.S. 227, 242.

11. *Seese v. Bethlehem Steel Co.,* 168 F.2d 58, 64.

12. *Brooklyn Savings Bank v. O'Neil,* 324 U.S. 697, 704, 709.

13. *Rogers Cartridge Co. v. Reynolds,* 166 F.2d 317, 321, which was relied upon by this Court in sustaining Section 9 of the Portal-to-Portal Act in *Lassiter v. Guy F. Atkinson,* 176 F.2d 984, 986. See also, **upholding Portal-to-Portal,** *Battaglia v. General Motors Corp.,* 169 F.2d 254, 259; *Fisch v. General Motors Corp.,* 169 F.2d 266, 271: "It is nothing short of a paradox to say that the Congress could not abolish this previously granted right if it concluded that the public interest required a change."

even if it were meritorious. Private persons cannot by contract take themselves outside of the power of Congress to regulate commerce.[14] Every contract has read into it the reservation of essential attributes of sovereign power as the postulate of the legal order.[15] Any contractual arrangements that were initially subject to the commerce power as exercised in the Fair Labor Standards Act must, in turn, be subject to that power if its exercise changes that Act. Such *a statutory change may constitutionally render that contract unenforceable or impair its value.*[16] "The power of the Congress in regulating interstate commerce was not fettered by the necessity of maintaining existing arrangements and stipulations which would conflict with the execution of its policy."[17]

Appellants seek to escape this overwhelming body of precedent. With this purpose they call their right to sue for damages under the Fair Labor Standards Act a "vested" right. While their windfall claims have not been reduced to final judgment, they argue that their cause of action is a "vested right, contractual in nature" and that their work was "consideration" "for the right granted by

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14. *Norman v. Baltimore & Ohio R. Co.,* 294 U.S. 240, 308; *Guaranty Trust Co. v. Henwood,* 307 U.S. 247, 258-259; *Louisville & Nashville R. Co. v. Mottley,* 219 U.S. 467, 482.

15. *Home Building & Loan Association v. Blaisdell,* 290 U.S. 398, 435; *Legal Tender Cases,* 12 Wall. 457, 551.

16. *Battaglia v. General Motors Corp.,* 169 F.2d 254, **upholding Portal-to-Portal,** quoting *Louisville & Nashville R. Co. v. Mottley,* 219 U.S. 467, 482, 485, 486; etc.; concluding, at p. 261: "Clearly the Act did not violate the Fifth Amendment in so far as it may have withdrawn from private individuals, these appellants, any rights they may be said to have had which rested upon private contracts they had made."

See also, **upholding Portal-to-Portal,** on this "contractual right" point, *Darr v. Mutual Life Ins. Co.,* 169 F.2d 262, 266; *Fisch v. General Motors Corp.,* 169 F.2d 266, 270, 271; *Thomas v. Carnegie-Illinois Steel Corp.,* 174 F.2d 711, 713.

17. *Norman v. Baltimore & Ohio R. Co.,* 294 U.S. 240, 310.

the statute."[18] The record, however, belies any contractual or *quid pro quo* character in these claims. The complaints are based on the statute, not a contract.[19] The trial court's findings show there was no contract to pay overtime-on-overtime: it held that appellants' claims were a "species of synthetic afterthought";[20] it found that the employers paid the overtime required by contract in the belief that no overtime-on-overtime was payable and that this belief was in good faith and in reliance on rulings of the Wage and Hour Administrator and other government agencies to this effect.[21] Appellants also offer a legal argument that they have "vested rights" to sue, but this at best is a play on words. Thus, they quote from *Brooklyn Savings Bank v. O'Neil:* "Sole right to bring such suit was vested in the employee." However, the Supreme Court was saying, not that the right was a "vested" one, but that it was given to the employee rather than to the Administrator.[22] Furthermore, cursory examination of the opinion will show that the Court was actually holding that the appellants' rights are of a character in sharp contrast to "vested" rights. Thus the Court points out that Section 16, on which appellants rely, prescribes compensatory damages that may be

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18. Appellants' Opening Brief, pp. 33, 37. However, it is obvious that the work done was consideration for the contract pay, straight time and overtime, rather than for any "right granted by the statute" to sue for damages under the Fair Labor Standards Act.

19. See paragraphs II and III of the complaints (Tr. 4, 11, 23).

20. Opinion of March 31, 1949 (Appendix, p. 27).

21. Tr. 53, 54.

22. Appellants quote this sentence at p. 34 of their brief. At 324 U.S. 697, 709, the Court stated: "No power was *vested* in the Administrator to bring an action at law to obtain payment of minimum wages left unpaid and to recover damages arising from delay in payment. Sole right to bring such suit was *vested* in the employee under § 16(b). Although this right to sue is compensatory, it is nevertheless *an enforcement provision.*" (Italics supplied.)

recovered in case an employer violates a regulation of commerce. Then, calling Section 16 an "enforcement provision" for effectuating public policy, it holds that the statutory right to sue for damages is so tied up with the public's interest that it cannot be disposed of privately.[23] Obviously a statutory right to sue for specified damages in order to induce compliance with a general regulation of commerce is not a "vested" right. Rather, it is one peculiarly subject to change when Congress finds that recovery of these damages would injure, rather than support, the public interest. Thus, the Sixth Circuit has stated, "Plaintiffs could not expect that their status or rights would remain unchanged through changing circumstances and conditions. They could reasonably anticipate changes in the law. The proposition that their rights granted by the Congress under the commerce clause could not be taken away by congressional legislation under the same clause, is self-contradictory."[24]

The Supreme Court has authoritatively answered the "vested rights" claim of appellants: "Contracts between private parties cannot create vested rights which serve to restrict and limit an exercise of a constitutional power of Congress."[25]

Appellants seem to argue that congressional legislation is unconstitutional merely if it causes someone pecuniary loss.[26] But the citizen and his property are not so free of

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23. See 324 U.S. 697, 704-713.

24. *Fisch v. General Motors Corp.,* 169 F.2d 266, 271, **upholding Portal-to-Portal** against the "vested right" argument. To the same effect: *Seese v. Bethlehem Steel Co.,* 168 F.2d 58, 62-63; *Battaglia v. General Motors Corp.,* 169 F.2d 254, 261.

25. *Guaranty Trust Co. v. Henwood,* 307 U.S. 247, 258-259.

26. At page 42 of their opening brief, appellants summarize the point they discuss at pp. 26 to 42: "The 81st Congress cannot * * * alter rights and obligations which arose during a period in which it had no existence."

governmental power. "No exercise of the legislative prerogative . . . (can be imagined) which will not to some extent abridge his liberty or affect his property."[27] Nevertheless Congress may legislate without violating the due process clause. "That provision has always been understood as referring only to a direct appropriation, and not to consequential injuries resulting from the exercise of lawful power."[28] Thus that clause does not invalidate a congressional statute making unenforceable existing contracts for passes on a railroad, though previously made for good consideration.[29] Nor a devaluation statute making unenforceable existing contracts for old dollars though good consideration had been given.[30] Nor a statute withdrawing statutory rights,[31] statutory remedies[32] or statutory de-

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27. *Nebbia v. New York,* 291 U.S. 502, 525. The Court continued, "The guarantee of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained."

28. *Legal Tender cases,* 12 Wall. 457, 551. See also *Louisville & Nashville R. Co. v. Mottley,* 219 U.S. 467, 484; *Norman v. Baltimore & Ohio R. Co.,* 294 U.S. 240, 305. The distinction is shown by the effect of this clause in cases where the United States has entered a contract for good consideration and tries to escape its obligations under its contract. *Lynch v. United States,* 292 U.S. 571, 579-580 (war risk insurance policies); *Perry v. United States,* 294 U.S. 330, 350-354 (gold clauses).

29. *Louisville & Nashville R. Co. v. Mottley,* 219 U.S. 467, 482, 484.

30. *Legal Tender cases,* 12 Wall. 457, 547-552; *Norman v. Baltimore & Ohio R. Co.,* 294 U.S. 240, 305-310; *Guaranty Trust Co. v. Henwood,* 307 U.S. 247, 258-259.

31. *National Carloading Corp. v. Phoenix-El Paso Express, Inc.,* 142 Tex. 141, 176 S.W.2d 564, cert. den. 322 U.S. 747; *Louisville Bridge Co. v. United States,* 242 U.S. 409, 419-421; *Flanigan v. County of Sierra,* 196 U.S. 553, 560; *Western Union Telegraph Co. v. Louisville & Nashville R. Co.,* 258 U.S. 13; *Norris v. Crocker,* 13 How. 429.

32. *Ex Parte McCardle,* 7 Wall. 506, 508, 514; *The Assessors v. Osborne,* 9 Wall. 567, 575; *Kline v. Burke Construction Co.,* 260 U.S. 226, 234.

fenses.[33] This being the law, surely the Courts of Appeals of nine circuits are correct in holding that the due process clause does not prohibit the exercise of the plenary commerce power to prevent retroactive enforcement of a repealed regulation of commerce that contravenes the public interest.[34]

Appellants also argue that the retroactive legislation is unconstitutional because the matter of reducing liability under the Fair Labor Standards Act is one solely within the province of the judicial branch. This argument is fully disposed of in the portal-to-portal opinions.[35] The issue was clearly a question for Congress rather than for the courts.[36]

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33. *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 315-316; *Johannessen v. United States*, 225 U.S. 227, 242; *Ewell v. Daggs*, 108 U.S. 143, 151. Similarly a statutory change in a rule of law may apply to pending cases. *Pennsylvania v. Wheeling and Belmont Bridge Co.*, 18 How. 421, 430-432; *Demorest v. City Bank Farmers Trust Co.*, 321 U.S. 36, 40-49; *United States v. Heinszen*, 206 U.S. 370, 387.

34. See the decisions of the nine circuits cited in notes 6, 7 and 8 upholding portal-to-portal. Here too, Congress prevents collection of windfall claims that would enforce an inequitable and repealed statutory interpretation, one which arose out of a technical failure to define statutory terms.

35. *Seese v. Bethlehem Steel Co.*, 168 F.2d 58, 62; *Battaglia v. General Motors Corp.*, 169 F.2d 254, 262; *Fisch v. General Motors Corp.*, 169 F.2d 266, 272.

36. "The action of Congress in the Portal Act in meeting the problems arising from these decisions represented a lawful and proper exercise of its legislative functions. Under the Fair Labor Standards Act, the courts are precluded from granting equitable relief, however harsh or oppressive the consequences. "**Such matters,**" the courts have declared, "**are for Congress and not for the courts**" (*Missel v. Overnight Motor Transportation Co.*, 126 F.2d 98, 111, aff'd 316 U.S. 572). (See also *Birbalas v. Cuneo Printing Industries,* 140 F.2d 826, 829.)" *Senate Report No. 402, 81st Congress, 1st Session* (accompanying H. R. 858); Appendix, p. 19 (emphasis added).

CONCLUSION

The constitutionality of retroactive modifications of the Fair Labor Standards Act, whether Portal-to-Portal or Overtime-on-Overtime, was summed up by the Court of Appeals for the Fourth Circuit in the *Seese* case:[37]

> "The Fair Labor Standards Act did not provide payment for employees engaged in that commerce but means by which wages might be regulated through application of maximum and minimum standards. When it was learned that this instrument of regulation was about to be used in such way as to injure the very commerce that it was designed to help, it is idle to say that Congress was without power to amend it in such way as to avoid the evil that was threatened."

Respectfully submitted,

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Robert E. Burns,
Richard Ernst,
Brobeck, Phleger & Harrison,
Attorneys for Pacific Maritime Association.

37. *Seese v. Bethlehem Steel Co.*, 168 F.2d 58, 63.

(Appendices follow)

Appendix A

81ST CONGRESS *1st Session* } HOUSE OF REPRESENTATIVES { REPORT No. 121

CLARIFYING OVERTIME COMPENSATION IN CERTAIN INDUSTRIES UNDER THE FAIR LABOR STANDARDS ACT

FEBRUARY 15, 1949.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed.

MR. LESINSKI, from the Committee on Education and Labor, submitted the following

REPORT

[To accompany H. R. 858]

The Committee on Education and Labor, to whom was referred the bill (H. R. 858) to clarify the overtime compensation provisions of the Fair Labor Standards Act of 1938, as amended, as applied in the stevedoring and building construction industries and for other purposes, having considered the same, report favorably thereon with amendments and recommend that the bill as so amended do pass.

The amendments are as follows:

(a) Page 1, line 7, after the word "employee" and before the dash, insert "employed in the longshore, stevedoring, building and construction industries."

(b) Amend the title so as to read:

A bill to clarify the overtime compensation provisions of the Fair Labor Standards Act of 1938, as amended, as applied in the longshore, stevedoring, building and construction industries.

STATEMENT

Under collective bargaining arrangements antedating the Fair Labor Standards Act of 1938, covering employees in the longshore, stevedoring, building and construction industries, work at straight-time rates has long been limited to specified hours of the day and week which were established in good faith under such agreements as the basic, normal, or regular workday or workweek for such employees. Under these agreements, work outside the basic, normal, or regular workday or workweek has traditionally been considered overtime and has been paid for at an overtime rate providing compensation 50 percent or more in excess of the bona fide rate payable during the basic, normal, or regular workday or workweek. Work performed on Saturdays, Sundays, holidays or on the sixth or seventh day of the workweek was likewise ordinarily made compensable at such contract overtime rates. The same pattern of compensation for employees in these industries was continued in collective bargaining agreements executed since the Fair Labor Standards Act of 1938 became effective.

Under the decisions of the Supreme Court of the United States in *Bay Ridge Operating Co. v. Aaron* and *Huron Stevedoring Corp. v. Blue* (335 U.S. 838), handed down on June 7, 1948, it was settled that the premium payments made to longshoremen for Saturday, Sunday, holiday, and night work under such agreements were not true overtime premiums for purposes of the Fair Labor Standards Act but were, rather, payments for work at undesirable hours. As such, the existing provisions of the Fair Labor Standards Act required that they be included in computing the regular rate of such employees and that they could not be credited toward overtime compensation due under the act.

The committee has heard testimony of representatives of labor, management, and the Department of Labor, all of whom are in agreement that the present law, in circumstances such as those considered by the Supreme Court in the Bay Ridge case, is creating serious difficulties in the maintenance of desirable labor standards arrived at through collective bargaining in the longshore, stevedoring, building and construction industries, and that amendment of the act to correct this situation is urgently necessary in order to prevent labor disputes which would seriously burden and obstruct commerce.

The potential effects of the present overtime requirements of the Fair Labor Standards Act on these types of agreements were demonstrated in the negotiation of a new contract for the east coast longshore industry in the fall of 1948. The inability of the parties to agree on a substitute for their traditional work pattern was an obstacle to settling a crippling strike. The anticipation of prompt legislative action to remedy this situation was one of the factors inducing settlement.

This Report is printed in full in the Appendix to Appellees' Brief.

Appendix B

Calendar No. 391

81ST CONGRESS, *1st Session* | SENATE | REPORT No. 402

CLARIFYING OVERTIME COMPENSATION UNDER THE FAIR LABOR STANDARDS ACT OF 1938, AS AMENDED

MAY 18 (legislative day, APRIL 11), 1949.—Ordered to be printed

Mr. HILL, from the Committee on Labor and Public Welfare, submitted the following

REPORT

[To accompany H. R. 858]

The Committee on Labor and Public Welfare, to whom was referred the bill (H. R. 858) entitled "A bill to clarify the overtime compensation provisions of the Fair Labor Standards Act of 1938, as amended, as applied in the longshore, stevedoring, building, and construction industries," having considered the same, now report the said bill, with amendments, and recommend that said bill, as so amended, do pass.

STATEMENT

This bill is intended as an amendment to section 7 of the Fair Labor Standards Act of 1938 and is designed to correct a situation which has developed in connection with the

so-called "clock overtime" or "overtime on overtime" issue. While this problem has arisen in a number of industries in this country, it has assumed particular importance in the longshore and stevedoring industries. In those industries, it has become particularly acute because of the decision of the Supreme Court in the case of *Bay Ridge Operating Co., Inc. v. Aaron* (334 U.S. 446, 1948) and a series of claims instituted in the courts seeking to recover, under the Fair Labor Standards Act of 1938, extra compensation allegedly due by reason of the failure of these industries to compute overtime compensation in compliance with that act. Estimates of the possible liability of industry generally vary substantially. The minimum figure which has been cited for the longshore and stevedoring industries is $10,000,000, but other estimates for these industries range up to a figure approximating $300,000,000. In other industries, such as electric and gas utilities, where continuous operations are essential, the potential liability is undetermined but of a substantial nature.

Basically, the problem stems from the failure of the Congress to include in the Fair Labor Standards Act any definition of "regular rate" of pay. The applicable provisions of that act read as follows:

> SEC. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—
>
> * * * * * * *
>
> (3) for a workweek longer than forty hours after the expiration of the second year from such date,
>
> unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

The bill, the adoption of which this committee recommends, would have the effect of furnishing a partial defini-

tion of "regular rate" of pay, in that the following extra compensation would not be deemed a part of the regular rate of pay[1] for the purpose of computing statutory overtime and would be creditable toward overtime payments required by the law:

1. Premium rates for work on Saturdays, Sundays, or holidays, or on the sixth or seventh day of the workweek, where the premium rate is not less than one and one-half the rate established in good faith for like work performed during nonovertime hours on other days;

2. Premium rates for work outside the basic, normal, or regular workday (not exceeding 8 hours) or workweek (not exceeding 40 hours) established in good faith by contract or agreement where the premium rate is not less than one and one-half times the rate established in good faith by contract or agreement for like work performed during such workday or workweek.

Two main questions were raised before your committee. As passed by the House, by a vote of 230 to 7, the bill applied only to future claims and was limited to the longshore, stevedoring, building, and construction industries. There was testimony to the effect that the House Committee on Education and Labor was unable to act upon the suggestion that a provision be added giving the bill retroactive effect because, it was claimed, under the rules of the House such a provision would not have been germane since the bill as originally introduced did not cover retroactivity.

In the hearings before your committee, substantial issues were raised as to (1) whether the bill should be made retro-

1. A full definition of "regular rate" of pay is now being considered by your committee in connection with the over-all revision of the Fair Labor Standards Act proposed in S. 653.

active to protect employers against existing claims for so-called "overtime on overtime" and (2) whether the bill should be broadened to include industry generally, instead of being restricted to the industries mentioned above. A subcommittee heard extensive testimony on both of these points from union and industry spokesmen, from counsel for claimants who have filed suit, and from certain of the executive departments and agencies. At the close of the hearings, briefs were requested by the subcommittee.

At the hearings, the proposal for retroactive validation of the provisions in collective bargaining or other employment agreements conforming to the standards generally agreed upon for future application was opposed principally by counsel for claimants who have instituted suits to recover so-called "overtime on overtime." They were joined in opposition by counsel for the CIO. On the other hand, the retroactive feature was not opposed by the A. F. of L. and, while that organization did not affirmatively support the principle of retroactivity, testimony of the International Longshoremen's Association, the A. F. of L. union principally affected, strongly suggested the need for such relief. The executive departments either supported the proposal for retroactive relief or failed to register any opposition thereto. No serious objection was made to the proposal that the bill be broadened to include industry generally.

Upon a careful consideration of the testimony and briefs, the committee has concluded that the bill should be amended so as to validate past overtime practices under collective bargaining or other agreements, thus avoiding the payment of "overtime on overtime" for the past as well as for

the future. We have also concluded that the bill should be made general in its application.

BACKGROUND

A. The longshore and stevedoring industries

Briefly stated, the problem which has arisen may be illustrated and explained by reference to the pay practices in the longshore and stevedoring industries. In these industries, as well as others, it has been customary for employers and labor organizations representing the employees to provide by contract that compensation at the rate of one and one-half times the straight-time rate shall be paid for work outside the straight-time hours stipulated in the contract. Thus, in the stevedoring industry the straight-time hours or normal workday has been fixed, on the east coast, from 8 a. m. to 12 noon and 1 p. m. to 5 p. m. weekdays; on the west coast, the first 6 hours of work, exclusive of mealtime, between 8 a. m. and 5 p. m., are the straight-time hours. Work after 5 p. m. and before 8 a. m. in the stevedoring industry on both coasts has been paid at a rate of one and one-half times the straight-time rate for the normal working hours. It should be noted that the payment of this premium rate is not dependent upon the employee having previously worked any specified number of hours, but is based upon the performance of work at particular times which are treated as outside the normal working day. Similarly, on both coasts work on Saturdays, Sundays, and holidays has been paid at the time-and-one-half premium rate without regard to work previously done during the workweek.

These arrangements have been in effect since 1916, when the International Longshoremen's Association made its

first collective-bargaining contract with employers in New York. One of the purposes of this arrangement, substantially realized, was to concentrate the work of the longshoremen in the straight-time hours.[2] The intended effect of such concentration was to bring about the employment of more men as there is pressure for more work to be done in the straight time hours. (See *Bay Ridge Operating Co., Inc. v. Aaron et al.,* 334 U.S. 446, 470.) This arrangement also served to compensate longshoremen for working at undesirable times.

After the enactment of the Fair Labor Standards Act, both parties to the longshore agreements proceeded on the assumption that the employer would receive credit under the act for overtime stipulated in the collective-bargaining agreement for all overtime work, including that work which was performed outside the normal working hours and for

2. The following figures, compiled in Justice Frankfurter's dissenting opinion in the *Bay Ridge case* and based upon the record and lower court findings, indicate the exceptional nature of "overtime" work:

	1932-37 average	Oct. 24, 1938 (effective date of FLSA) to Aug. 31, 1939 (eve of war)	Apr. 1, 1944—Mar. 31, 1945 (height of wartime activity)
Work performed during straight-time hours	79.93%	75.03%	54.5%
Night work	15.13%	17.89%	20.5%
Week-end work	4.94%	7.08%	25.0%
Total night work by men who had worked during same day	13.2%	23.29%	44.5%
Ditto by those who had not	86.8%	76.71%	55.5%
Total man-hours, consisting of night work by those who had not worked during same day	2.57%	4.17%	11.1%
Concentration of man-hours, straight time over overtime	11.22	8.47	3.38

which the premium rate of time and one-half was paid. The parties took this position without regard to whether or not payment of this premium rate was premised upon the number of hours previously worked. Indeed, the parties expressly referred in their contract to these payments as "overtime." There is no evidence of any issue being raised with respect to this arrangement and its administration until October of 1943.

Indeed, in December 1938, 2 months after the Fair Labor Standards Act became law, representatives of the industry on the west coast were officially advised by the regional attorney of the Wage and Hour Division that "clock overtime" at one and one-half the contract straight-time rate met the overtime provisions of the act. The inquiry was whether, in computing statutory overtime under labor agreements or company practices which—

fix a straight-time rate and also an overtime rate of pay at one and one-half the straight-time rate, the former being applicable during specified hours of the day, the latter after the expiration of a maximum number of hours specified or at certain times such as at night or on Sundays or holidays—

it was proper to take the view that—

the term "regular rate" as used in the act is the straight-time rate and not the overtime rate.

The regional attorney replied that—

where collective-bargaining agreements or company practices have established a straight-time hourly rate of pay and also an overtime hourly rate of pay at one and one-half times the straight time rate, the straight-time rate is the "regular" rate, within the meaning of section 7(a) of the Fair Labor Standards Act.

The Administrator of the Wage and Hour Division consistently held, prior to the Bay Ridge decision, that premium rates for week-end and holiday work of at least one and one-half times the rate paid during the normal or regular working hours were true statutory overtime rates,

and hence were to be excluded in computing the "regular rate" for overtime purposes and could be credited against statutory overtime. (See Interpretative Bulletin No. 4, U. S. Department of Labor, Wage and Hour Division, pars. 13, 69, 70.)

By letter dated October 15, 1943, the Administrator of the Wage and Hour Division advised the War Shipping Administration, for the account of which a substantial amount of all stevedoring work was then being done, that the so-called "clock overtime" provided for in labor contracts for work after 5 p. m. did not constitute statutory overtime. He suggested that conferences be held to consider the problem. The effect of this administrative interpretation was to treat the "clock overtime" rate as a part of the "regular rate" of pay which should be used as a basis for calculating the statutory liability for hours worked in excess of 40 hours per week. It also denied to the employer the right to apply the 50 percent premium to any statutory liability arising from working his employees in excess of 40 hours a week. No complaint was made as to the propriety of treating the "contract overtime" rate for week-end and holiday work as statutory overtime. As disclosed in the table cited above, between April 1, 1944, and March 31, 1945, about 45 percent of the work was being performed during contract overtime hours, about equally divided between night work (i.e., after 5 p. m.) and week-end work.

The testimony before this committee reveals that, following this letter, extended conferences were held between the Administrator and the War Shipping Administration as well as other branches of the Government, including the War and Navy Departments, and the Department of Jus-

tice. All Government agencies, except the Wage and Hour Division, were of the opinion that the overtime practices of the industry were valid. The Administrator refrained from taking final and formal action on the issue or from attempting to enforce his position through injunctive action, as he had the right to under section 17 of the Fair Labor Standards Act. Government contracting agencies instructed the industry to maintain their normal practices and early in 1945 entered into indemnity agreements protecting the stevedoring companies against liability.

Except for special situations of limited scope in Puerto Rico and Davisville, R. I., the broad issues out of which the Bay Ridge decision resulted developed from litigation instituted in 1945. It is significant to note that, prior to the institution of these suits, the employees were compensated in accordance with the previous understanding of the parties to the collective-bargaining agreement without complaint of either labor organizations or individual employees. The district court ruled against the claimants but was reversed by the circuit court of appeals and the Supreme Court upon appeal. The majority of the Supreme Court, in the Bay Ridge decision, held that the statutory overtime concept was based upon "excessivity" and that the so-called clock overtime provided for in the collective-bargaining agreement therefore did not fall within the statutory concept.

B. Other industries

In industries other than longshore, stevedoring, and building and construction, it has also been a practice of long standing to pay premium rates of time and one-half,

pursuant to collective bargaining agreements for work before or after certain designated hours or for work on week ends and holidays. Thus, a study by the Bureau of Labor Statistics, published in the Monthly Labor Review for October 1947, and based on an analysis of over 400 union contracts covering slightly over 2,000,000 workers in 31 manufacturing and nonmanufacturing industries, showed that about half of the agreements contained provisions for premium pay of at least time and one-half for week end and holiday work. More specifically, the Bureau found that (1) over 50 percent of the agreements, "covering over 750,000 workers * * * had provisions requiring penalty rates for work performed on Saturday as such"; (2) "about 60 percent, covering a similar proportion of workers, required penalty rates for Sunday work as such"; (3) "more than four-fifths of all workers in the sample received premium pay for production work on holidays"; and (4) in several industries, including automobiles, cotton textiles, men's clothing, and canning and preserving, agreements specified premium pay of time and one-half for work outside an employee's regular shift. The study further stated that—

> more than 80 percent of the workers who received premium pay for Saturday or Sunday as such were paid time and a half for Saturday work and double time for Sunday work, irrespective of the number of hours previously worked during the week—

while of those paid premium rates for holiday work—

> two-thirds were paid double time, and a third, time and a half.

It is readily apparent, therefore, that the "overtime on overtime" problem, especially that aspect of it which relates to week-end and holiday work, is of general application.

Testimony presented to your committee by representatives of non-maritime industries fully substantiates the fact

that the "overtime on overtime" problem is not confined to the longshore and stevedoring industries. Mr. Walker Cisler, executive vice president of the Detroit Edison Co., testified that the union contracts of that company, which, of course, operates on a continuous basis, require the payment of time and one-half for work outside scheduled hours. He estimated the potential liability of that company for overtime on overtime at "well over $1,000,000 annually." Representatives of other public utilities, such as Cleveland Electric Illuminating Co. and the Wisconsin Public Service Corp., testified in support of the bill. Mr. C. B. Boulet, director of personnel of the Wisconsin Public Service Corp., testified that, based upon his experience as the chairman of the industrial relations committee of the Edison Electric Institute, the problem for utilities generally is serious and merited prompt relief.

In addition, D. W. Tracy, president of the International Brotherhood of Electrical Workers (AFL), the oldest and largest labor organization in the electric utility field, in a formal statement to the committee, said:

> I heartily support the legislation which has been proposed for the longshoring stevedoring, and building and construction industries. It is my view, based upon the experience of the brotherhood in dealing with the overtime-on-overtime problem in the many industries of the United States where we represent employees, that there is an equal need for quick action in the electric utility industry prior to the enactment of the general amendments to the wages and hours laws.

Additional evidence before the committee from various industries, including general construction, meat packing, brewing, warehousing, printing, and publishing, makes clear that the perplexing problem of "overtime on overtime" is not confined to the longshore and stevedoring industries. In consequence, it is apparent that the bill should be of general application, and your committee so recommends.

RETROACTIVITY

The only question remaining for consideration is whether the provisions of this bill should be made retroactive so as to prevent the maintenance of suits now pending or the enforcement of claims which shall have accrued prior to the enactment of this bill.

In considering this question, we have been fully cognizant of the traditional policy against the granting of such relief except under special circumstances. Deviations from this policy, we believe, should not be made lightly, for retroactive relief is an extraordinary remedy.

The issue which the committee has had to resolve was whether the facts establish the special circumstances warranting retroactive relief. We are of the opinion that they do. The considerations prompting this conclusion are as follows:

1. The claims are in the nature of windfalls and in derogation of the collective-bargaining agreements as understood in the past by the contracting parties. The longshore contract involved in the Bay Ridge case specifically stated that all time not denominated straight time "shall be considered overtime and shall be paid for at the overtime rate." Moreover, the denial of retroactive relief would, in effect, penalize the large bulk of employees who have chosen to abide by the terms of the collective agreement. The inequity of allowing such claims to prevail is further aggravated by reason of the fact that the bulk of such claims arose from wartime exigencies which distorted normal work patterns.

2. The premium arrangements, understood by the contracting parties to conform to the statutory overtime re-

quirements, were the result of collective bargaining. There is no evidence that the bargaining was other than at arm's length. It resulted in an arrangement which was highly advantageous to the employees covered by the collective agreement. As the district court found in the Bay Ridge case, there was 8½ times as much contractual overtime as there was overtime measured by the number of hours in excess of 40 worked for one employer. Further, to the extent to which the arrangement was intended to and did spread employment by encouraging the concentration of work in straight-time hours, it is consistent with one of the main purposes of the maximum hour provision of the Fair Labor Standards Act.

3. The House and Senate reports on the Fair Labor Standards Act strongly support the view that the act was—

> intended to aid and not supplant the efforts of American workers to improve their position by self-organization and collective bargaining (H. Rept. No. 1452, 75th Cong., 1st sess., p. 9; S. Rept. No. 884, 75th Cong., 1st sess., pp. 3-4).

4. Without retroactivity, the effect upon many companies that have an important impact upon commerce may be disastrous. As to the longshore industry, estimates of potential liability range from $10,000,000 to approximately $300,000,000. It is contended that the Government would assume much of the potential liability. This would appear to be the situation, at least in those areas covered by War Shipping Administration contracts, as a result of the cost-plus-fixed-fee arrangement and the 1945 indemnity agreement. It is questionable, however, whether the same result would follow outside this area, as, for example, contracts with the War Department, which did not contain any cost-plus-fixed-fee provision. It is probable, therefore, that the

industry, in the event of successful prosecution of these cases, would not be completely insulated. The evidence presented to your committee reveals that the average stevedore has a net worth of between $100,000 and $250,000; that his annual wage bill is between 10 and 15 times his net worth; that collection of claims, adding only 5 percent per annum to his wage bill for only 2 years, will threaten bankruptcy to many of the companies affected. Liability for even a small portion of these claims will threaten the survival of many of these companies.

5. On the basis of the evidence, it seems reasonably clear that prior to 1943, the parties had no notice of their potential liability under the overtime provisions of the Fair Labor Standards Act. Indeed, as early as December 1938, in a letter written by the regional attorney of the Wage and Hour Division in San Francisco, to a representative of the longshore industry, the statement was made that the clock overtime arrangement constituted statutory overtime. This letter was part of the evidence produced in the recent trial of the issue before the Federal district court in California, as part of the good-faith defense under the Portal-to-Portal Act (Public Law 49, 80th Cong.). The court rendered judgment against the plaintiffs on the basis of this defense. (See *Moss v. Hawaiian Dredging Co.,* decided March 30, 1949, Case No. 25299-G, United States District Court, Northern District of California, Southern Division.)

6. Great reliance is placed by opponents of retroactivity upon the position taken by the Wage and Hour Division in 1943 and subsequent thereto. In a letter to the War Shipping Administration, dated October 15, 1943, the Administrator stated that in his view the overtime practice of the longshore industry was in violation of the overtime

provisions of the Fair Labor Standards Act. He noted that any change in wage practices of firms operating under contract with the War Shipping Administration required approval of that agency and therefore invited comments and suggestions from it. There followed numerous conferences among interested Government agencies and it was the view of the War Shipping Administration, the Army and Navy, and the Department of Justice, that the Wage and Hour Administrator was wrong in his construction of the act. While the Administrator is vested with responsibility of administering the Fair Labor Standards Act, and consequently his views are to be accorded considerable weight, his judgment is not necessarily infallible. Thus, the Administrator, during this period, continued to uphold the propriety of crediting week end and holiday contract overtime against statutory overtime although it is to be noted that the Supreme Court subsequently ruled that this practice was likewise erroneous. These circumstances, i. e., the division of view among responsible Government officials, the length of the period during which the parties had observed this practice without issue being raised, and the fact that there was a reasonable question as to the correctness of the Administrator's view, deprive the notice argument of much of its persuasive force.

The committee therefore, recommends that the bill include a provision for retroactivity. Precedent for such a retroactive provision is found in the Portal-to-Portal Act. Under section 2 of that act, Congress provided relief against portal-to-portal claims arising out of the Supreme Court decision in the *Mt. Clemens case* (328 U.S. 680). Under section 3 (d) of that act, Congress retroactively vali-

dated compromise agreements which had been rendered invalid by the Supreme Court decision in *Schulte v. Gangi* (328 U.S. 108). In section 9, Congress provided for good-faith defense against existing Wage and Hour claims of all kinds in order to meet the problems resulting from Supreme Court decisions in cases such as *Jewell Ridge Coal Corp. v. Local No. 6167, UMW* (325 U.S. 161), and *Addison v. Holly Hill Fruit Products, Inc.* 322 U.S. 607).

The action of Congress in the Portal Act in meeting the problems arising from these decisions represented a lawful and proper exercise of its legislative functions. Under the Fair Labor Standards Act, the courts are precluded from granting equitable relief, however harsh or oppressive the consequences. "Such matters," the courts have declared, "are for Congress and not for the courts" (*Missel v. Overnight Motor Transportation Co.,* 126 F.(2d) 98, 111, affirmed 316 U.S. 572). (See also *Birbalas v. Cuneo Printing Industries,* 140 F.(2d) 826, 829.)

* * * * * * * *

We believe that the overtime-on-overtime claims cannot be distinguished from the claims covered by the Portal-to-Portal Act. In both cases the claims arose under the Fair Labor Standards Act and would not have existed were it not for that law; in both cases, the claims arose by reason of the failure of Congress to define a basic term in that act—the "workweek" in the portal-to-portal situation and "regular rate" in this overtime-on-overtime situation; in both cases, prosecution of the claims violated the spirit of collective-bargaining agreements; in both cases, the filing of suits was deplored by responsible A. F. of L. officials; in both cases, the collection of claims would unfairly penal-

ize employers who attempted in good faith to comply with the wages-and-hours law. Indeed, in every important respect the overtime-on-overtime claims closely parallel the portal-to-portal claims. In our opinion, the factual and legal findings recited in the Portal-to-Portal Act are equally applicable here, and the situation requires the same expeditious and equitable treatment by Congress.

* * * * * * * *

This Report is printed in full in the Appendix to Appellees' Brief.

Appendix C

EXCERPTS FROM TEXT OF PORTAL-TO-PORTAL PAY ACT OF 1947

SEC. 2. RELIEF FROM CERTAIN EXISTING CLAIMS UNDER THE FAIR LABOR STANDARDS ACT OF 1938, AS AMENDED, THE WALSH-HEALEY ACT, AND THE BACON-DAVIS ACT.—

(a) No employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act (in any action or proceeding commenced prior to or on or after the date of the enactment of this Act), on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any activity of an employee engaged in prior to the date of the enactment of this Act, except an activity which was compensable by either—

(1) an express provision of a written or nonwritten contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or

(2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee was employed, covering such activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer.

* * * * * * *

SEC. 9. RELIANCE ON PAST ADMINISTRATIVE RULINGS, ETC. —In any action or proceeding commenced prior to or on or after the date of the enactment of this Act based on any act or omission prior to the date of the enactment of this Act, no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any administrative regulation, order, ruling, approval, or interpretation, of any agency of the United States, or any administrative practice or enforcement policy of any such agency with respect to the class of employers to which he belonged. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice, or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect.

* * * * * * *

Appendix D

In the United States District Court, for the Northern District of California, Southern Division

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Duane Moss, et al., Plaintiffs, vs. Hawaiian Dredging Co., et al., Defendants.	No. 25299-G.
Consolidated Cases, hereby referred to and made a part hereof by number.	25300 26068 26242 25301 26069 26243 25302 26070 26245 26060 26071 26247 26061 26072 26535 26062 26073 26536 26063 26074 26537 26064 26075 26919 26065 26076 27001 26066 26077 26076 26078

OPINION

Goodman, District Judge.

Plaintiffs are approximately 500 longshoremen, known as "walking bosses," and approximately 700 marine terminal warehousemen, who, in 32 cases consolidated for trial, seek recovery from their employers of certain alleged unpaid overtime wages pursuant to §16(b) of the Fair Labor Standards Act of 1938. (29 U.S.C.A. §201 et seq.)

Suits were instituted on behalf of the warehousemen in November of 1945 and related, so far as the claims for payment of overtime are concerned, to the period beginning in November of 1942. Suits on behalf of the longshoremen "Walking bosses" were filed in the summer of 1945 and related to a period commencing in June of 1943.

By the time the cases came to trial in May of 1947, the Portal-to-Portal Act of 1947 (29 U.S.C.A. §251 et seq.) had become effective and the defendants, with the consent of

the Court, amended their answers to plead the special defenses provided for in Sections 9 and 11 of that Act.*[1] At the trial, the main issue litigated was whether or not defendant employers had paid the plaintiffs overtime compensation according to the formula set forth in §7*[2] of the Fair Labor Standards Act. Defendants contended that the

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*1. Section 9 (29 U.S.C.A. 258) provides: "In any action or proceeding commenced prior to or on or after May 14, 1947 based on any act or omission prior to May 14, 1947, no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healy Act, or the Bacon-Davis Act, if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any admistrative regulation, order, ruling, approval, or interpretation of any agency of the United States, or any administrative practice or enforcement policy of any such agency with respect to the class of employers to which he belonged. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice, or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect."

Section 11 (29 U.S.C.A. 260) provides: "In any action commenced prior to or on or after May 14, 1947 to recover unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 216(b) of this title."

*2. Section 7 (29 U.S.C.A. 207) provides: "(a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

(3) for a workweek longer than forty hours after the expiration of the second year from such date, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

term "regular rate" in §7(a)(3) meant contract "straight time" rate. The plaintiffs contended that the term "regular rate" must be determined factually by dividing the total compensation received by the total number of hours worked. Evidence was also received at the trial with respect to the special defenses presented under §§9-11 of the Portal-to-Portal Act. Upon the conclusion of the trial in June of 1947, the cause was submitted on briefs to be filed. Respective counsel thereafter obtained, upon stipulation, from time to time, orders extending the time for the filing of briefs, partly for the reason that Bay Ridge Co. v. Aaron, 334 U.S. 446, which involved the precise question of the meaning of the term "regular rate" of pay, had reached and was being considered by the Supreme Court. On June 7, 1948, the Supreme Court decided the Bay Ridge case and upheld the contention of plaintiffs in this case as to the meaning of "regular rate" of pay. Counsel then proceeded to file further briefs with respect to the special defenses in these cases. Thereafter, plaintiffs moved the Court to reopen the cause for the purpose of receiving further evidence upon the subject of the so-called "good faith" defenses. Upon the hearing of the motion, the evidence sought to be received was heard and the Court reserved ruling on the motion. The Court now grants the motion and the evidence presented is admitted.

After a study of the record and of the Congressional proceedings leading to the enactment of the Portal-to-Portal Act and such authorities as are pertinent,[*3] I am

*3. For cases discussing the meaning and application of the term "good faith" as used in sections 9 and 11, see: Rogers Cartage Co. v. Reynolds, 6 Cir., 166 F.2d 317; Reid v. Day & Zimmerman, 73 F. Supp. 892, affirmed, 8 Cir., 168 F.2d 356; Jackson v. North-

convinced that the special defenses have been sustained and that the plaintiffs are not entitled to recover.

No useful purpose will be served by recounting the evidence on these issues. It is sufficient to say that I find that the defendants who were members of the Waterfront Employers' Association relied in good faith upon the administrative rulings of the Administrator of the Fair Labor Standards Act and in good faith followed the pay practices approved by such rulings.*[4] The evidence adduced after the reopening of the cause even more convincingly sustains the contentions of the defendants. This is for the reason that the Administrator, although appealed to on behalf of complaining employees in other parts of the United States, failed to rule in favor of the pay practices subsequently approved by the Supreme Court in the Bay Ridge case.

Special consideration was given in these causes, in supplemental briefs, to the question as to whether the act of the employers in obtaining indemnifying agreements from the governmental agencies involved, negatived the claim of good faith reliance upon the administrative rulings. A study of this question satisfies me that the obtaining of the indemnification agreements in no way evidenced any

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west Airlines, 76 F. Supp. 121; Kerew v. Emerson Radio & Phonograph Corp., 76 F. Supp. 197; Burke v. Mesta Mach. Co., 79 F. Supp. 588; Bauler v. Pressed Steel Car Co., 81 F. Supp. 172; Gustafson v. Fred Wolferman, Inc., 73 F. Supp. 186.

*4. The ruling mainly relied upon by defendants was contained in a letter addressed by Miss Dorothy Williams, Regional Attorney for the Wage and Hour Division of the Department of Labor, under date of Dec. 6, 1938, to the Industrial Association of San Francisco, in response to an inquiry made by the Association on behalf of waterfront employers, in which the categorical statement was made that overtime compensation should be calculated on the basis of a percentage of the "straight time" rate of compensation.

lack of reliance upon the administrative rulings. Such might have been the case, if there had been conflicting administrative rulings. For in that event the obtaining of indemnification agreements would be strong evidence of non-reliance. But here the administrative rulings relied upon were non-conflicting and approved the pay practices followed by the defendants. Hence the obtaining of the indemnification agreements can be said to be no more than good business practice on the part of the defendants.*5

The evidence is also convincing that there was good faith reliance by the CPNAB,*6 non-members of the Waterfront Employers' Association, upon administrative rulings which approved the pay practices followed by them.

The humanitarian objectives and purposes of the Fair Labor Standards Act have been consistently and unequivocally recognized and approved by both the Congress and the Courts. But this litigation is a species of synthetic afterthought of a kind which obviously motivated Congress in enacting sections 9 and 11 of the Portal-to-Portal Act of 1947.

In view of the disposition of the cause here made, there is no need to decide the issue raised as to the alleged "executive" status of the "walking bosses."

Judgment will go for the defendants, upon findings to be presented, pursuant to the Rules.

Dated: March 30, 1949.

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*5. This precise question was the subject of Congressional discussion. See Congressional Record, Feb. 27, 1947, Vol. 93, pp. 1566 and 1569; May 1, 1947, Vol. 93, pp. 4502, 4516, 4517, and 4577. Cf. Jackson v. Northwest Airlines, 76 F. Supp. 121.

*6. CPNAB is descriptive of certain defendants who, as a group, were "Contractors, Pacific Naval Air Bases," engaged in the construction of naval air bases in the Pacific under Navy Contracts.